IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:02cv217-C

REBECCA WILLIS,	)	
	)	
Plaintiffs,	)	
	)	**MEMORANDUM AND**
Vs.	)	**RECOMMENDATION**
	)	
TOWN OF MARSHALL, NORTH CAROLINA, a corporation of the State of North Carolina,	)	
	)	
Defendant.	)	
	)	

THIS MATTER is before the Court on Defendant's Motion to Dismiss and on Plaintiff's Motion for Preliminary Injunction. Having considered the pleadings, the parties' briefs, and the applicable law and having heard the arguments of counsel, the undersigned recommends that, with the exception of one claim, Defendant's Motion to Dismiss be denied and that Plaintiff's Motion for Preliminary Injunction be granted.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Rebecca Willis is a long-time resident of Madison County, North Carolina and lives just outside the boundaries of Defendant Town of Marshall, a small community in the mountains of Western North Carolina. (Affidavit of Rebecca Willis ¶ 1). Located in the heart of Marshall is the old Southern Railway Depot, which the Town of Marshall leases and is now known as the Marshall Depot. (Am. Compl. ¶ 7). The Town uses the Depot as a museum and community center. (*Id.* ¶ 9). Some time after the Town began leasing the Depot, its Board of Aldermen appointed a committee to coordinate events at the Depot, known as the Marshall Depot Committee ("Committee"). (*Id.* ¶ 10; Boone Aff. ¶ 3; Ward Aff. ¶ 3). This Committee generates the funds necessary to produce the events held at the Depot and coordinates the events. (Boone Aff. ¶ 3; Ward Aff. ¶ 3). Among the events coordinated by the Committee are Friday evening concerts, weekly events including country or blue grass music, dancing, raffles, and general

fellowship. (Am. Compl. ¶ 11). Musicians sign up to perform, and located next to the performance stage in the front of chairs set up for viewing the performances is a dance floor for those wishing to dance. (*Id.* ¶¶ 12-13). These events are open to the public and are well attended by a broad range of community members, including small children and grandchildren. (*Id.* ¶ 11, 13).

On the back wall inside the Depot are nine "Rules of Behavior," which read:

(1) No Drinking (Alcoholic Beverages);

(2) No Smoking;

(3) Shoes and Shirts Required;

(4) No Sitting on Rails;

(5) No Blocking Doors;

(6) No Cases or Instruments Left on Deck;

(7) No Jamming Inside Depot or on Deck;

(8) No Unsupervised Children Allowed to Run Loose Around Building; and

(9) No Soliciting.

(Am. Compl. ¶ 14). There are no other posted rules or regulations regarding dress or appropriate behavior at the Depot. (*Id.* ¶ 15).

According to the Amended Complaint, Plaintiff regularly attended the Friday evening concerts and particularly enjoyed dancing "exuberantly and flamboyantly." (Am. Compl. ¶ 17). Plaintiff's dancing, however, upset certain members of the community, whose affidavits the Town has submitted in opposition to Plaintiff's motion for preliminary injunction. According to this evidence, Plaintiff danced in a sexually provocative manner, wearing very short skirts or what appeared to be a long shirt, gyrating, and simulating sexual intercourse with her partner while hunched on the floor. (*See, e.g.*, Boone Aff. ¶ 7; Allen Aff. ¶ 4; Ward Aff. ¶ 6). Some of the Town's witnesses stated in their affidavits that Plaintiff's undergarments, buttocks, or "privates" were visible while she was dancing. (Dodd Aff. ¶ 3; Dora Reeves Aff. ¶ 3; Bill Reeves Aff. ¶ 3;

Payne Aff. ¶¶ 4-5; Seivers Aff. ¶ 9). Kathleen Dodd stated in her affidavit that on one occasion, when her grandchildren were standing next to her, Plaintiff climbed the steps at the Depot and stated that she was "going to show [her] boobs and shake [her] boobs" that night, which she later did. (Dodd. Aff. ¶ 4). A number of community members complained to members of the Depot Committee about Plaintiff's dancing, requesting that they do something to "tone it down," and some people said that they would not continue to come to the Depot because of concern about their children or spouses seeing such activity. (Allen Aff. ¶ 5; Ward Aff. ¶ 11; Dodson Aff. ¶ 6; Morton Aff. ¶ 7; Seivers Aff. ¶ 10). One of the Town's witnesses, Beverly Seivers, stated in her affidavit that although she had enjoyed attending the Friday evening events at the Depot regularly, she stopped going to them because she "simply did not feel comfortable observing . . . [Plaintiff's] vulgar and sexually provocative behavior." (Seivers Aff. ¶ 11).

In response to these complaints, the Committee requested that one of its members, Reatha Ward, warn Plaintiff that her behavior was inappropriate and to curtail her provocative dancing. (Boone Aff. ¶ 7; Nix Aff. ¶ 4; Ward Aff. ¶ 7; Wild Aff. ¶ 4). According to the Town's witnesses, Plaintiff's dancing grew more provocative following this warning. (Ward Aff. ¶ 8). The Committee then directed Ms. Ward to inform Plaintiff that she was no longer welcome at the Depot. (Boone Aff. ¶ 11; Nix Aff. ¶ 6; Ward Aff. ¶ 8). The Committee, acting through Ms. Ward, then requested that the Mayor of the Town, Mr. John Dodson, send a letter to Plaintiff, requesting her not to attend Depot events. (Boone Aff. ¶ 11; Ward Aff. ¶ 9; Wild Aff. ¶ 6; Dodson Aff. ¶ 8). On or about December 12, 2000, Mayor Dodson sent Plaintiff a letter, the body of which stated in its entirety:

> Due to the inappropriate behavior exhibited by you and having received previous warnings from the Marshall Depot Committee it is the consensus of the Committee that you are banned from the Marshall Depot. This action is effective as of today's date.

(Exh. C attached to Willis Aff.).

On September 20, 2002, Plaintiff filed this action against the Town. Plaintiff filed an Amended Complaint on November 22, 2002, in which she alleges that the Town violated her right to access a public forum, her right to freedom of speech, her right to equal protection, and her right to procedural due process under the First and Fourteenth Amendments to the United States Constitution. Plaintiff also alleges that the authority on which the Town relied in banning her from the Depot is unconstitutionally overbroad and void for vagueness, also in violation of Plaintiff's rights under the First and Fourteenth Amendments. The Town subsequently filed a motion to dismiss this action, to which Plaintiff filed a response. Plaintiff then filed a motion for preliminary injunction, requesting that the Court enjoin the Town from committing further acts of alleged misconduct as described in the Amended Complaint.

In support of her motion for preliminary injunction, Plaintiff filed several affidavits, including the affidavits of Hugh and Pat Mathus. Mr. and Ms. Mathus stated in their affidavits that they attend the Friday evening events at the Depot regularly and that they have often seen Plaintiff dance. (Hugh Mathus Aff. ¶¶ 2, 4; Pat Mathus Aff. ¶¶ 2, 4). According to these witnesses, Plaintiff's dancing was no different in character than that of other dancers at the Depot, nor was Plaintiff's dress any more provocative or revealing than that of other women. (Hugh Mathus ¶¶ 5, 6; Pat Mathus ¶¶ 5, 6). Plaintiff also presented the affidavit of Katherine Maheu, a professional dance educator and former collegiate dance instructor, who stated in her affidavit that based on a videotape of Plaintiff's dancing aired on the *Inside Edition* television show on April 4, 2001, it was her opinion that Plaintiff's dancing was "well within the confines of what would be deemed tasteful and appropriate for dancing in a club." (Maheu Aff. ¶¶ 4, 5). Ms. Maheu stated further that she regularly viewed dancing around the State of North Carolina and that while she had observed members of the public engage in sexually suggestive dancing, Plaintiff's dancing could not reasonably be construed as vulgar, lewd, or obscene, nor was it even in the same category as the sexually suggestive dancing Ms. Maheu had witnessed. (*Id.* ¶ 6). Finally, in support of her motion for summary judgment, Plaintiff submitted a copy of the

videotape of the *Inside Edition* program on which Plaintiff's dancing had been shown and discussed. In the videotape, Madison County Sheriff's Deputy Scott Graddy stated, apparently in response to a question concerning the consequences of Plaintiff's returning to the Depot: "Right now, she's been banned by the Town attorney and committee, and at this point, she would be charged with trespassing." (Exh. A attached to Second Willis Aff.).

DISCUSSION

I. Defendant's Motion to Dismiss

A. Rule 12(b)(6) Motion to Dismiss Standard

The Town moves to dismiss each of Plaintiff's claims for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. A complaint should not be dismissed for failure to state a claim upon which relief can be granted unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984); *see also Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957). In evaluating a motion to dismiss, "a court must accept the factual allegations of the complaint as true." *GE Investment Private Placement Partners II v. Parker*, 247 F.3d 543, 548 (4th Cir. 2001). Notwithstanding this exacting standard, dismissals should be granted when warranted. As recognized by the Supreme Court in *Neitzke v. Williams*, 490 U.S. 319, 109 S. Ct. 1827 (1989), the Rule 12(b)(6) procedure for early dismissal "streamlines litigation by dispensing with needless discovery and fact finding." *Id.*, 490 U.S. at 326-27, 109 S. Ct. at 1832. Accordingly, "[n]othing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable." *Id.*, 490 U.S. at 327, 109 S. Ct. at 1832.

Because, when evaluating the sufficiency of a complaint under Rule 12(b)(6), "a court must accept the factual allegations of the complaint as true," *Parker*, 247 F.3d at 548, it is not appropriate to consider matters outside the pleadings, *see* Fed. R. Civ. P. 12(b) (motion to dismiss under Rule 12(b)(6) should be treated as one for summary judgment where matters outside the

pleadings are presented and not excluded by the court). Accordingly, when considering the sufficiency of Plaintiff's allegations, the undersigned will consider only the allegations as set forth in the Amended Complaint and not the evidence presented by the parties in support of, and in opposition to, Plaintiff's motion for preliminary injunction.

B. Denial of Access to a Public Forum

Plaintiff alleges in her first cause of action that the Town violated her right of access to a public forum in violation of the First and Fourteenth Amendments to the United States Constitution. The Town moves to dismiss this count, arguing that Plaintiff does not allege that the primary purpose of the dances at the Depot was the free exchange of ideas or that the Depot was opened for expressive activity.

It is now well established that courts should evaluate the First Amendment implications of restrictions on speech that occurs on government property or with government participation under a "public forum" analysis. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677, 118 S. Ct. 1633, 1641 (1998); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44, 103 S. Ct. 948, 954 (1983); *Sons of Confederate Veterans, Inc. v. Commissioner of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 622 (4th Cir. 2002); *Warren v. Fairfax County*, 196 F.3d 186, 190 (4th Cir. 1999). The Supreme Court has identified three types of fora for First Amendment purposes: the traditional public forum; the designated, or limited, public forum; and the non-public forum. *See International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79, 112 S. Ct. 2701, 2705 (1992); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802, 105 S. Ct. 3439, 3449 (1985); *Warren*, 196 F.3d at 190-91. Restrictions on speech in a traditional public forum violate the First Amendment unless they are narrowly drawn to achieve a compelling state interest, while restrictions on speech in a non-public forum survive First Amendment scrutiny as long as they are reasonable and are not an effort to suppress the speaker's activity because of her viewpoint. *Lee*, 505 U.S. at 679, 112 S. Ct. at 2705; *see also Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 229 (2nd Cir. 1996) ("An individual's freedom of

speech is at its zenith when sought to be exercised in a traditional public forum, and at its nadir when sought to be exercised in a non-public forum."). The standard to be applied to speech in a designated public forum is not quite as clear, as it depends, at least in part, on the purposes for which the public forum is opened and whether the speaker falls within the class of persons for whom the forum is opened. *See Warren*, 196 F.3d at 193-94; *compare Perry*, 460 U.S. at 49, 103 S. Ct. at 257 (the state may draw distinctions which relate to the special purpose for which the property is used) *with Lee*, 505 U.S. at 678, 112 S. Ct. at 2705 (regulation of speech on designated public forum, whether of a limited or unlimited character, is subject to same limitations that govern a traditional public forum). It is clear, however, that where the speaker whose speech is restricted falls within the class of persons for whom the forum was created, strict scrutiny applies. *See Warren*, 196 F.3d at 193.

In determining which category applies to a particular forum, courts consider the location, the objective use and purposes of the property, and the government intent and policy with respect to the property, including its historic and traditional treatment. *Warren*, 196 F.3d at 191. Traditional public fora are those places, such as public streets and parks, that have "by long tradition or by government fiat been devoted to assembly and debate." *Perry Educ. Ass'n*, 460 U.S. at 45, 103 S. Ct. at 954. Designated public fora are those places that the government has opened for expressive activity by part or all of the public. *Lee*, 505 U.S. at 678, 112 S. Ct. at 2705. As noted by the Supreme Court in *Cornelius*, "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802, 105 S. Ct. at 3449. Put another way, "[t]he government creates a designated public forum when it purposefully makes property 'generally available' to a class of speakers," while it "may retain nonpublic forum status by allowing selective, permission-only access to the forum." *Warren*, 196 F.3d at 193.

In this case, Plaintiff has alleged facts that, if proven, are sufficient to support the conclusion that the Town created a designated public forum when it leased the Depot and made it

available to the general public for the Friday evening events. Specifically, Plaintiff has alleged that the Depot was "expressly designated by the Town for use by the public at large for engaging in expressive activities protected by the First and Fourteenth Amendments." (Am. Compl. ¶ 29). With respect to the particular expressive activities that took place at the Depot on Friday nights, Plaintiff alleges that these events included music performances on a stage, dancing on a floor adjacent to the stage, and general fellowship and camaraderie among those who attended. Plaintiff has alleged further that Plaintiff attended and used the Depot for the purpose for which it was designated, satisfying the requirement that Plaintiff be within the class of persons for whom the Town created the public forum. Finally, Plaintiff alleges that the Town, through the actions of Mayor Dodson or the Depot Committee, banned Plaintiff from the designated public forum, depriving her of her right to equal access to a public forum in violation of the First and Fourteenth Amendments.

The Town argues, however, that "Plaintiff has failed to establish that the Marshall Depot was opened by Defendant for expressive activity." (Def. Br. Supp. Mot. to Dismiss at 8). This argument fails, first, because on a motion to dismiss for failure to state a claim, Plaintiff need not "establish" anything; rather, Plaintiff needs merely to have alleged facts to support each element of the cause of action the Town seeks to have dismissed. In this case, Plaintiff has explicitly alleged that the Depot was opened to the general public for the performance and enjoyment of music and dance. As set forth below, the issue of whether the dancing that occurred at the Depot was expressive activity for First Amendment purposes is a question that may, as argued by the Town, ultimately be answered in the negative. However, it cannot seriously be questioned that the music performances were expressive activity protected by the First Amendment:

> Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and the emotions, and have censored musical compositions to serve the needs of the state. . . . The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment.

Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S. Ct. 2746, 2753 (1989) (citations omitted); *see also Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 390 (4th Cir. 1993). As Plaintiff has alleged that the Town opened the Depot for the general public's enjoyment of music, *a fortiori*, Plaintiff has also alleged that the Town opened the Depot for the general public's enjoyment of expressive activities protected by the First Amendment.

The Town also argues that this claim fails because the recreational dancing in which Plaintiff participated at the Depot was not expressive activity, and, therefore, any restriction prohibiting her from engaging in that dancing does not implicate, much less violate, the First Amendment. Even if the Town is correct that its proscription against Plaintiff's dancing does not implicate the First Amendment, however, this argument ignores the fact that the Town's alleged conduct in banning Plaintiff from the Depot extends well beyond a prohibition against her dancing. Plaintiff alleges that not only is she prohibited from dancing at the Depot, but that she is further banned from visiting a designated public forum open to the general public and from receiving the ideas and opinions communicated by the expressive activity that occurs each Friday night at the Depot. As affirmed recently by the Fourth Circuit, the First Amendment "protects *both* a speaker's right to communicate information and ideas to a broad audience *and* the intended recipients' right to receive that information and those ideas." *Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003); *see also Board of Educ. v. Pico*, 457 U.S. 853, 866-67, 102 S. Ct. 2799, 2808 (1982) (recognizing that the Constitution protects not only the right to expression, but also, the right to receive information and ideas); *Vasquez v. Housing Auth. of El Paso*, 271 F.3d 198, 202 (5th Cir. 2001) ("The first amendment protection extends not only to those who contribute to the market place of ideas, but necessarily extends to those who seek to benefit from the resultant dialogue."), *cert. denied*, 2003 WL 21304975 (U.S. June 9, 2003). Accordingly, Plaintiff has alleged sufficient facts to support the conclusion that her First and Fourteenth

Amendment right to receive expression in a designated public forum has been abridged by the Town.[1]

C. Denial of First and Fourteenth Amendment Rights

In her Second Claim for Relief, Plaintiff alleges that she was deprived of her right to freedom of expression and association under the First and Fourteenth Amendments, when the Town prohibited her from engaging in expressive conduct and associating with others at the Depot. The Town moves to dismiss this claim on the basis, primarily, that Plaintiff's dancing did not, as a matter of law, constitute protected expression. Because freedom of expression and freedom of association are distinct rights under First Amendment jurisprudence, each will be addressed separately below.

1. Freedom of Expression

The Town first argues that Plaintiff's dancing was not expressive conduct protected under the First Amendment, and that the Town's prohibition of her dancing did not, therefore, implicate the First Amendment. It is clear, and the Town does not dispute, that dancing can be, depending on the circumstances and communicative elements of the dance, expressive conduct protected by the First Amendment. For example, there is no doubt that a ballet performance of *Swan Lake* produced at New York's Lincoln Center, in which a story is communicated through dance

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[1]In her First Claim for Relief, Plaintiff alleges that her First and Fourteenth Amendment rights were violated because she was denied access to "public facilities." (*See* Am. Compl. ¶ 34). From the Amended Complaint, it appears that Plaintiff is alleging that the denial of access to public facilities violates her First Amendment right to freedom of speech, applicable to the States through the Fourteenth Amendment. Freedom of access to public facilities in and of itself, however, is more properly characterized as a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. Nevertheless, the improper denial of access to a public forum in which expressive activity occurs constitutes, as set forth above, an infringement of an individual's right to receive expression under the First Amendment. Plaintiff's allegations that she was denied access to a public forum, therefore, adequately states a claim under the First and Fourteenth Amendments *because* expressive activity occurs regularly in that forum to which she was denied access. *See, e.g.*, *Young v. Lepone*, 305 F.3d 1, 8 (1st Cir. 2002) (a complaint should not be dismissed unless it appears to a certainty that plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged); *Harrison v. United States Postal Serv.*, 840 F.2d 1149, 1152 (4th Cir. 1988) (same); *see also Fischer v. First Chicago Capital Markets, Inc.*, 195 F.3d 279, (7th Cir. 1999) (reversing Rule 12(b)(6) dismissal where facts alleged stated a claim under a legal theory never argued by the plaintiff).

performed on a stage in front of an audience constitutes protected expression. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 581, 111 S. Ct. 2456, 2468 (1991) (dancing as a performance is expressive activity) (Souter, J., concurring); *see also Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 519 (4th Cir. 2002) (holding that plaintiff would likely prevail on its overbreadth challenge to public indecency statute where statute regulated "a substantial amount of expression that resembles a ballet"); *Chase v. Davelaar*, 645 F.2d 735, 739-40 (9th Cir. 1981) (striking regulation as unconstitutionally overbroad where regulation prevented establishments from "presenting various plays, musicals, ballets, and other items ordinarily regarded as expressive"). It is also now established that nude dancing constitutes protected expression, albeit expression that is at the "margins" of protected expression and expression that can be limited through reasonable time, place, or manner restrictions. *See Barnes*, 501 U.S. at 566, 111 S. Ct. at 2460 (nude dancing performed as entertainment is expression within the "outer perimeters" of the First Amendment, though "only marginally so," and may be limited by reasonable time, place, or manner restrictions) (plurality opinion); *D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140, 144-48 (4th Cir. 1992); *see also United States v. O'Brien*, 391 U.S. 367, 376-77, 88 S. Ct. 1673, 1678-79 (1968) (enunciating First Amendment standard for time, place, or manner restrictions placed on expressive conduct). It is further established that not all dancing is protected expression. For example, the Fourth Circuit stated quite plainly in *D.G. Restaurant Corp.* that "recreational dancing, although containing a 'kernel' of expression, is not conduct which is sufficiently communicative to bring it within the protection of the First Amendment."[2]

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[2]As Plaintiff notes in her briefs, in stating that recreational dancing is not sufficiently expressive to come within the protection of the First Amendment, the Fourth Circuit in *D.G. Restaurant Corp.* explicitly relied on the Supreme Court's decision in *City of Dallas v. Stanglin*, 490 U.S. 19, 109 S. Ct. 1591 (1989). While *Stanglin* contained language suggesting that recreational dancing was not sufficiently expressive to fall within the protection of the First Amendment, however, the language was couched in the rubric of a freedom of association analysis because *Stanglin* only concerned whether the plaintiffs freedom of association rights were abridged by a Texas ordinance:

> It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street

D.G. Restaurant Corp., 953 F.2d at 144.

The issue in this case, then, as to whether Plaintiff was engaging in expressive activity when she was dancing at the Depot turns on whether her dancing was merely recreational dancing, in which case it would not constitute expressive activity protected by the First Amendment, or, alternatively, performance dancing with sufficient communicative elements to warrant at least some level of First Amendment protection. In her Amended Complaint, Plaintiff alleges that she danced on a dance floor at the front of the Depot "adjacent to the performance stage," that she danced "exuberantly and flamboyantly," and that she was banned from the Depot because other attendees at the Friday night events "did not approve of the message [Plaintiff] conveyed through her . . . dancing." (Am. Compl. ¶¶ 13, 17, 20). Plaintiff alleges, therefore, that her dancing included communicative elements and that she was dancing at the front of the performance venue on a dance floor adjacent to the stage. While these allegations may do so only barely, the undersigned cannot say, as a matter of law, that Plaintiff could prove no set of facts consistent with these allegations that would state a claim for the infringement of her right to freedom of expression under the First and Fourteenth Amendments. *See Hishon*, 467 U.S. at 73, 104 S. Ct. at 2232; *see also Conley*, 355 U.S. at 45-46, 78 S. Ct. at 102. Depending on the

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> or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons—*coming together to engage in recreational dancing*—is not protected by the First Amendment. Thus this activity qualifies neither as a form of "intimate association" nor as a form of "expressive association" as those terms were described in *Roberts* [*v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244 (1984)].

Stanglin, 490 U.S. at 25, 109 S. Ct. at 1595 (emphasis added). Because the issue of whether "coming together to engage in recreational dancing" violates the dance hall patrons' freedom of association rights under the First Amendment is different from the issue of whether an absolute prohibition against recreational dancing violates an individual's right to freedom of expression under the First amendment and because *Stanglin* quite clearly addressed only the former, the Fourth Circuit's reliance on *Stanglin* as deciding the latter *may* be misplaced. Nevertheless, as the Fourth Circuit has stated clearly that recreational dancing is not sufficiently communicative to be protected by the First Amendment, the undersigned cannot recommend a holding to the contrary. *See also Barnes*, 501 U.S. at 581, 111 S. Ct. at 2468 (relying on *Stanglin* for the proposition that ballroom dancing is "beyond the [First] Amendment's protection") (Souter, J., concurring).

location and orientation of the audience, for example, the precise nature of Plaintiff's dancing and its communicative elements, and whether particular audience members perceived that Plaintiff was part of the entertainment, it is conceivable that Plaintiff could prove that her dancing was, in fact, a performance and not merely recreational, requiring some level of First Amendment scrutiny to the Town's conduct in prohibiting Plaintiff's dancing.

The Town objects, however, that Plaintiff must have alleged that she intended to convey a "particularized message," which she has not done in the Amended Complaint. It is true that in determining whether Plaintiff's dancing is expressive activity protected by the First Amendment, the Court will have to determine whether it contained sufficient expressive elements and in so evaluating Plaintiff's dancing, the Court will address whether Plaintiff intended to convey a particularized message and whether there was a likelihood that the message would be understood by those who viewed it. *See Texas v. Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533, 2539 (1989); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 283 (5th Cir. 2001). The Supreme Court has also stated plainly in the context of a discussion of symbolic speech, however, that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, the music of Arnold Schoenburg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569, 115 S. Ct. 2338, 2345 (1995). Here, where Plaintiff has alleged that she danced at the front of a performance hall and that her dancing was prohibited because of the message her dancing conveyed, Plaintiff has alleged sufficient facts to withstand the Town's motion to dismiss. The undersigned cannot at this early stage of the proceedings, therefore, recommend the dismissal of Plaintiff's Second Claim for Relief on the basis that her dancing did not, as a matter of law, constitute protected expression.

2. Freedom of Association

In addition to the freedom of expression, the First Amendment also protects, in certain circumstances, a freedom of association, which Plaintiff alleges was also abridged by the Town's banning her from the Depot. *See Stanglin*, 490 U.S. at 23-24, 109 S. Ct. at 1594. As explained by the Supreme Court in *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244 (1984), the freedom of association applies in two distinct sets of circumstances: first, the freedom of association protects an individual's freedom "to enter into and maintain certain intimate human relationships"; second, the freedom of association protects "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.*, 468 U.S. at 617-18, 104 S. Ct. at 3249. In *Stanglin*, the Court denominated the former type of protected association as "intimate association" and the latter as "expressive association." *See Stanglin*, 490 U.S. at 25, 109 S. Ct. at 1595. With respect to the right to "expressive association," the Court stated in *Roberts*: "[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622, 104 S. Ct. at 3252.

Notwithstanding this broad language in *Roberts*, however, the Court in *Stanglin*, as discussed above, held that minor dance hall patrons' right to free association under the First Amendment was not abridged by an ordinance prohibiting adults from attending certain dance halls open to minors only. *See Stanglin*, 490 U.S. at 25, 109 S. Ct. at 1595. In so holding, the Court stated: "[W]e do not think the Constitution recognizes a generalized right of 'social association' that includes chance encounters in dance halls." *Id.* The Court noted that the teenagers who congregated in the dance hall at issue were not members of a particular organized association, that most were strangers to each other, and that the dance hall admitted all who were willing to pay the admission fee. *Id.*, 490 U.S. at 24-25, 109 S. Ct. at 1595. The Court's analysis

in *Stanglin*, then, suggests a more narrow right to "expressive association" and, specifically, a right limited to those gatherings in which there is at least some intentional association for the purpose of engaging in expressive activity. The Court's decisions also suggest that this intentional association must be greater than a "social association" among persons who are primarily strangers to each other and in which engaging in expressive activity is not one of their primary purposes.

In this case, Plaintiff alleges generally that her right to free association was abridged by the Town's decision to ban her from the Friday night events. As discussed above, based on the performance of music alone, Plaintiff has alleged facts to support the conclusion that the Depot was opened for the purpose of at least that type of expressive activity. Plaintiff has also alleged that attendees at the Friday night events participated in raffles, cake walks, and general conversation. There are no allegations, however, that the majority of encounters between individuals attending these events was anything other than by chance, and since performers sign up on the night of the performance, it is not reasonable to infer from the allegations that members of the community intentionally gather to receive particular expression.

While the undersigned agrees with Plaintiff that the Town's banning her entirely from receiving the expression communicated during the Friday night events implicates the First Amendment, a fair reading of First Amendment jurisprudence in the area of freedom of association suggests that a viable claim for infringement of the right to free association requires at least some collective intent to gather that is greater than simply the intent to attend the same music concert. In other words, even while a person's right to receive the expression communicated through the dancing of *Swan Lake* is protected, at least in some measure, by the First Amendment, the undersigned does not believe, based on his review of federal First Amendment jurisprudence, that all of those who happen to be attending the same performance of *Swan Lake* at the Lincoln Center are also engaging in the type of "expressive association" protected by the First Amendment's right to free association. The right to free association may

properly be characterized as a right that flows naturally and necessarily from the right to freedom of expression. *See Roberts*, 468 U.S. at 622, 104 S. Ct. at 3252 ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."); *see also Stanglin*, 490 U.S. at 23-24, 109 S. Ct. at 1595 (recognizing that the First Amendment does not "in terms" protect a right of association, which right is one that has been judicially recognized). However, that the freedom of association flows naturally from the freedom of expression does not mean that the two are co-extensive, such that each time an individual's right to receive or engage in expressive activity is violated where that individual was one of a group of persons engaged in the same activity, the individual's right to freedom of association is also violated.

In this case, Plaintiff has failed to allege facts from which a trier of fact can reasonably infer that the persons attending the Depot on Friday evenings were engaged in collective expressive activity protected by the First Amendment's right to freedom of association. Accordingly, if the Court disagrees with the conclusion that Plaintiff has alleged facts sufficient to state a claim for violation of her First and Fourteenth Amendment right to freedom of expression, the undersigned recommends that the Court grant the Town's motion to dismiss Plaintiff's Second Claim for Relief on the basis that she has failed to allege facts sufficient to state a claim for an abridgement of her right to free association under the First and Fourteenth Amendments.

D. Denial of Procedural Due Process

In her Third Claim for Relief, Plaintiff asserts that the Town's action in banning her from the Depot deprived her of a liberty interest without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The Town moves to dismiss this claim on the basis that Plaintiff's right to attend the Friday night events is not a liberty interest sufficient to implicate Fourteenth Amendment due process protections.

It is well established that the Due Process Clause of the Fourteenth Amendment, which

provides that no state shall "deprive any person of life, liberty, or property, without due process of law," requires that before a person is deprived of life or a protected liberty or property interest, she be afforded due process. U.S. Const. Amend. XIV; *see Mallette v. Arlington County Employees' Supplemental Retirement Sys. II*, 91 F.3d 630, 634 (4th Cir. 1996). The provision of adequate procedural protections from the improper deprivation of a liberty or property interest is central to the concept of ordered liberty upon which our Constitution is based: "It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat." *Wisconsin v. Constantineau*, 400 U.S. 433, 436, 91 S. Ct. 507, 509 (1971). In determining whether a plaintiff's procedural due process rights have been violated, a court must determine, first, whether the plaintiff was deprived of life, liberty, or property and, second, if such a deprivation occurred, whether the plaintiff received the "minimum measure of procedural protection warranted under the circumstances." *Mallette*, 91 F.3d at 634.

Although the contours of what constitutes a protected liberty interest have not been precisely defined, *see Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571, 92 S. Ct. 2701, 2706 (1972) (noting that "liberty" and "property" in the context of the Due Process Clause are "broad and majestic terms . . . left to gather meaning from experience"), the Supreme Court has defined it to include "those privileges long recognized at common law as essential to the orderly pursuit of happiness of free men," *Meyer v. State of Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626 (1923). At least two circuit courts of appeal have recognized in the context of an analysis of fundamental freedoms protected by substantive due process under the Fourteenth Amendment that the freedom to move about within a locality is a freedom protected by the Due Process Clause. *See Johnson v. City of Cincinnati*, 310 F.3d 484, 497-98 (6th Cir. 2002) (evaluating liberty interest jurisprudence and concluding that "the right to travel locally through public spaces and roadways enjoys a unique and protected place in our national heritage"), *cert. denied*, 2003 WL 1873610 (U.S. June 9, 2003); *Lutz v. City of York, Penn.*, 899 F.2d 255, 268

(3rd Cir. 1990) ("We conclude that the right to move freely about one's neighborhood or town, even by the automobile, is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history.'"). A plurality of the Supreme Court has also recognized that "an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside the frontiers that is 'a part of our heritage' . . . ." *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 54, 119 S. Ct. 1849, 1858 (1999) ((quoting *Kent v. Dulles*, 357 U.S. 116, 126, 78 S. Ct. 1113, 1118 (1958))) (plurality opinion); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-91, 86 S. Ct. 211, 213 (1965) (describing ordinance permitting a person to stand on a public sidewalk "only at the whim of any police officer" as one with "ever-present potential for arbitrarily suppressing First Amendment liberties").

It seems plain from these decisions, as well as from a logical application of the central premise that the Due Process Clause of the Fourteenth Amendment protects our most basic freedoms that the freedom to move about in public places and attend gatherings open to the general public occurring in public fora falls within the contours of the liberty interests protected by the Fourteenth Amendment. As explained by Justice Douglas nearly four decades ago:

> Freedom of movement, at home and abroad, is important for job and business opportunities—for cultural, political, and social activities—for all the commingling which gregarious man enjoys. Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them, and against restraint, knowing that the risk of abusing liberty so as to give rise to punishable conduct is part of the price we pay for this free society.

Aptheker v. Secretary of State, 378 U.S. 500, 519-20, 84 S. Ct. 1659, 1671 (1964) (Douglas, J., concurring).

Having determined that Plaintiff has alleged a violation of a liberty interest protected by the Fourteenth Amendment, the next question is whether she has adequately alleged that the Town failed to accord her the "minimum measure of procedural protection warranted under the circumstances." *Mallette*, 91 F.3d at 634. On this issue, there can be no debate. In her Amended Complaint, Plaintiff alleges that she received a letter signed by Mayor Dodson and banning her

from the Depot and that she never received notice or an opportunity to be heard and present evidence prior to the decision to ban her. Plaintiff also alleges that there is no mechanism for the appeal of that decision. Plaintiff, therefore, alleges a complete absence of any process afforded her either before or after the decision to ban her from the Depot. Because Plaintiff has alleged facts sufficient to support the conclusion that her protected liberty interests were deprived without the provision of any process to ensure a fair decision, the undersigned will recommend the denial of the Town's motion to dismiss Plaintiff's Third Claim for Relief.

E. Overbreadth and Vagueness

In her Fourth Claim for Relief, Plaintiff mounts a facial attack on the authority on which the Town relied in banning her from the Depot as unconstitutionally vague and overbroad, rendering such authority void and unenforceable as a matter of law. Specifically, Plaintiff asserts that this authority impermissibly restricts activities protected by the First and Fourteenth Amendments and that it fails to give fair warning to Plaintiff or other individuals as to what course of conduct is forbidden and will result in banishment. The Town argues that this claim should be dismissed because Plaintiff has failed to allege facts sufficient to establish that her actions constituted expressive conduct protected by the First and Fourteenth Amendments. The Town's argument on this issue misses the point as it fails to appreciate that Plaintiff is attacking the authority on which the Town relied on its face, regardless of whether her conduct falls within the protective sweep of the First Amendment. Nevertheless, the undersigned will assess the sufficiency of Plaintiff's allegations in this claim.

As set forth above, Plaintiff asserts that the authority on which the Town relied is void and unenforceable because it is unconstitutionally overbroad and vague. *See Morales*, 527 U.S. at 53, 119 S. Ct. at 1857 (imprecise laws can be attacked on their face under two doctrines: overbreadth and vagueness). With respect to overbreadth, the Supreme Court has recognized that a facial attack on a statute that impermissibly infringes on citizens' First Amendment rights is cognizable where "the overbreadth of a statute [is] not only . . . real, but substantial as well, judged in

relation to the statute's plainly legitimate sweep." *Broaderick v. Oklahoma*, 413 U.S. 601, 614, 93 S. Ct. 2908, 2918 (1973); *see also Giovani Carandola*, 303 F.3d at 512 (in order for court to invalidate a law for overbreadth, the number of impermissible applications must be substantial). In this case, however, there is no statute or ordinance for this Court to review. The Town has cited no legislative or executive authority for its actions in this case. While its alleged application to Plaintiff in this case may suggest that this authority was, at the least, unconstitutionally applied to Plaintiff, it is impossible for the Court to gauge the alleged overbreadth of an unwritten statute, ordinance, or regulation. An unwritten regulation is, however, appropriately considered under the void-for-vagueness doctrine, to which the undersigned now turns.

As the Supreme Court has articulated, "[t]he void-for-vagueness doctrine reflects the principle that 'a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Roberts*, 468 U.S. at 629, 104 S. Ct. at 3256 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127 (1926)). A statute is void-for-vagueness if either (1) it fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; or (2) it authorizes or even encourages arbitrary and discriminatory enforcement. *Morales*, 527 U.S. at 56, 119 S. Ct. at 1859. This doctrine, while more commonly employed to invalidate criminal laws, is applicable to civil statutes and regulations. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99, 102 S. Ct. 1186, 1193 (1982); *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1267 (3rd Cir. 1992). Additionally, while facial challenges are disfavored, they are appropriate "[w]hen vagueness permeates the text of [the] law." *Morales*, 527 U.S. at 55, 119 S. Ct. at 1858.

In this case, Plaintiff alleges in the Amended Complaint that no authority had been cited supporting the Town's actions in banning Plaintiff from the Depot and that there were no provisions within the Town's charter that could give fair warning that a particular course of

conduct was forbidden and would result in banishment. Plaintiff alleges further that to the extent the Town relied on the Town Charter, it purported to grant the Town undue discretion to determine whether a particular activity contravened the law. These allegations are sufficient to state a claim that the authority on which the Town relied in banning Plaintiff is unconstitutionally vague and, consequently, unenforceable. The undersigned will recommend, therefore, that the Town's motion to dismiss this claim be denied.

F. Equal Protection

Finally, Plaintiff alleges that the Town's conduct in banning her from the Depot violated her right to equal protection of the law under the Equal Protection Clause of the Fourteenth Amendment. The Town moves to dismiss this claim on the basis that Plaintiff's Amended Complaint alleges a rational basis for her banishment from the Depot and on the basis that Plaintiff has failed to allege that the Town acted out of personal malice against her.

Distilled to its essence, the Equal Protection Clause directs the government to treat all similarly situated people alike. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 3254 (1985); *Harlen Assoc. v. Incorporated Village of Mineola*, 273 F.3d 494, 499 (2nd Cir. 2001). Although equal protection claims generally allege discriminatory treatment based on membership in a protected class, the Supreme Court has recognized "successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074 (2000) (per curiam); *see also Tri County Paving, Inc. v. Ashe County*, 281 F.3d 430, 439 (4th Cir. 2002). As explained by the Court, "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Olech*, 528 U.S. at 564, 120 S. Ct. at 1074-75 (internal quotation marks, brackets, and citation omitted). The Court then affirmed the denial of a

Rule 12(b)(6) motion to dismiss where the complaint alleged that the defendant treated the plaintiff differently from other similarly situated persons and that this discrimination was "irrational and wholly arbitrary." *Id.*, 528 U.S. at 565, 120 S. Ct. at 1075. In so holding, the Court made clear that these allegations were sufficient "quite apart from the [defendant's] subjective motivation." *Id.*

In this case, Plaintiff has adequately alleged that she "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *See Olech*, 528 U.S. at 564, 120 S. Ct. at 1074. In particular, Plaintiff alleged in the Amended Complaint that she had been "intentionally treated differently from others similarly situated without any basis for the difference in treatment." (Am. Compl. ¶ 61). Based on the allegations held sufficient in *Olech*, this allegation alone would probably suffice to withstand dismissal at this stage in the proceedings. Plaintiff went further, however, alleging more specifically that she was banned, while others who attended the Friday evening events and engaged in similar activities were not banned, and she alleged that the Town was motivated by "a bad faith intent to injure and/or to punish or inhibit the exercise of constitutional rights." (*Id.* ¶ 64). Indeed, the Town has no explanation as to why Plaintiff was banned while the man engaging in the alleged sexually provocative dance with her was not. Finally, Plaintiff alleged that the Town's acts were arbitrary and without rational basis. (*Id.* ¶ 66). In light of the Court's decision in *Olech*, there can be no question but that these allegations suffice to state a claim for a violation of Plaintiff's equal protection rights under the Fourteenth Amendment. *Cf. DeMuria v. Hawkes*, 328 F.3d 704, 707 (2nd Cir. 2003). The undersigned will, therefore, recommend that the Court deny the Town's motion to dismiss Plaintiff's equal protection claim.

II. Plaintiff's Motion for Preliminary Injunction

Having addressed the sufficiency of Plaintiff's allegations as set forth in the Amended Complaint as to each claim alleged, the undersigned turns now to Plaintiff's motion for preliminary injunction, in which Plaintiff requests that this Court enjoin the Town from banning

Plaintiff's attendance at any event open to the general public at the Depot, enjoin the Town from placing any restrictions on any form of dancing by Plaintiff, and enjoin the Town from engaging in any other practices found by the Court to be unlawful and unconstitutional. The Town objects to the issuance of an injunction.

As the Fourth Circuit has affirmed, "a preliminary injunction is an extraordinary remedy, to be granted only if the moving party clearly establishes entitlement to the relief sought." *Hughes Network Sys., Inc. v. InterDigital Communications Corp.*, 17 F.3d 691, 693 (4th Cir. 1994) (internal quotation marks and citation omitted). In deciding whether to issue a preliminary injunction, a court must consider: (1) the likelihood of irreparable harm to the plaintiff if the injunction is denied; (2) the likelihood of harm to the defendant if the requested relief is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest. *See Giovani Carandola*, 303 F.3d at 511; *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1992). In applying this test, the first two factors relating to the likelihood of irreparable harm to the plaintiff if the injunction is denied and to the defendant if the injunction is issued are the most important. *See Manning v. Hunt*, 119 F.3d 254, 263 (4th Cir. 1997). For this reason, an assessment of these factors generally begins with determining the nature and extent of the harm the plaintiff will experience if no injunction is entered and balancing that harm against the harm the defendant will suffer if the injunction is issued. *See id.* If this balance of harm "tips decidedly" in favor of the plaintiff, a preliminary injunction will be granted if "the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." *Direx Israel*, 952 F.2d at 812. If the balance of hardships tips away from the plaintiff, she must show a stronger likelihood of success on the merits. *See id.* Because the level of a plaintiff's burden to show a likelihood of success on the merits depends on the balance of hardships, this balancing of the

hardships generally occurs before an assessment of her likelihood of success on the merits. *See Manning*, 119 F.3d at 263-64.

In the context of a First Amendment challenge, however, the Fourth Circuit has noted that the "irreparable harm" alleged by the plaintiff may well be inextricably linked to her claim that her First Amendment rights were violated. *See Giovani Carandola*, 303 F.3d at 511. In such cases, it may be appropriate to begin with an assessment of the plaintiff's likelihood of success on the merits.

Here, Plaintiff alleges harm under the First and Fourteenth Amendments, making an initial determination of her likelihood of success on the merits appropriate. As each of Plaintiff's claims has been addressed in detail above, this determination need not be lengthy. From the allegations in the Amended Complaint as well as the affidavit testimony submitted by both parties, it is clear that when the Town banned Plaintiff, it did so pursuant to no legislative enactment nor executive regulation, and it accorded her no more than two verbal warnings without opportunity to be heard and no recourse for appeal or fair determination of the issues. The ban was for an indefinite period of time and applied to all events held at the Depot, including those events open to the general public and at which expressive activity occurred. While two contested issues—whether Plaintiff's dancing constituted expressive activity protected by the First Amendment and whether there were other persons engaged in similar activity who were not banned—are not sufficiently developed for the Court to be able to state that Plaintiff is likely to succeed on the merits of her Second and Fifth Claims for Relief, Plaintiff has shown a strong likelihood of success on the merits of the remainder of her claims. Specifically, Plaintiff has shown that there is a strong likelihood that she can prove that her First Amendment right to receive expression was violated by the Town, that her Fourteenth Amendment procedural due process rights were violated, and that the authority on which the Town relied in banning her from the Depot was unconstitutionally vague and, therefore, unenforceable.

Having determined that Plaintiff has shown a strong likelihood of success on the merits, it follows that her continued banishment from the Depot constitutes irreparable injury: As the Supreme Court has made clear, "loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976); *see also Giovani Carandola*, 303 F.3d at 520-21. With respect to harm to the Town, the Fourth Circuit has recognized that a governmental entity does not suffer harm by the issuance of a preliminary injunction preventing that unit from enforcing restrictions likely to be found unconstitutional. *See id.* at 521. Finally, "upholding constitutional rights surely serves the public interest." *Id.* The undersigned will, therefore, recommend that the Court issue an injunction prohibiting the Town from any further application of the ban against Plaintiff and requiring that the Town permit Plaintiff to return to the Depot and to participate in all events open to the general public.[3] With respect to Plaintiff's dancing, because the authority applied to curtail her dancing is likely to be held void and unenforceable, the Town may not restrict Plaintiff's dancing unless it relies on some other, constitutionally permissible authority.

As a final note, the undersigned feels compelled to state the following.[4] The law in this case, at least on several issues and on the evidence so far presented to the Court, is unquestionably in Plaintiff's favor. For that reason, the undersigned has no choice but to recommend the denial of the Town's motion to dismiss with respect to nearly all claims asserted

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[3]In addition to arguing the propriety of a preliminary injunction, the Town also argues that this case is not ripe for judicial determination and that Plaintiff lacks standing since she alleges only that she reasonably anticipates that if she returns to the Depot she will be arrested for trespassing. This argument ignores, however, that the ban itself causes injury if it is unlawful. Additionally, the undersigned notes that during an *Inside Edition* television program about this controversy, Madison County Sheriff's Deputy Scott Graddy stated that Plaintiff would be charged with trespassing if she returned to the Depot.

[4]As discussed above, at this early stage in the proceedings and without further factual development of the record, the undersigned cannot determine whether Plaintiff, in fact, engaged in the conduct alleged by the Town or, if she did, whether Plaintiff's dancing merits some level of constitutional protection. These comments should not be viewed as expressing an opinion as to either of these issues. Nevertheless, because of the rift in the community apparent during the hearing on this matter, the undersigned feels compelled to comment briefly.

by Plaintiff and the issuance of a preliminary injunction in her favor. However, as important as the protections afforded the citizens of this country by the First Amendment and, indeed, all of the Bill of the Rights are, the First Amendment was intended to be employed as a shield against improper government intrusion, not as a sword to be wielded against our neighbors or used to divide our communities. While political, religious, and even social dissent are crucial to the continuing growth of our society, the undersigned can discern no social or political value in Plaintiff's alleged conduct, thereby causing embarrassment and discomfort to other community members, including children. The small town, multi-generational fellowship fostered by events such as those held at the Depot on Friday nights was once part of the fabric of this nation and provided the social foundation on which many children and young adults were reared. This type of fellowship is, unfortunately, rare in our age of unprecedented mobility and urban growth. Where it still exists such wonderful fellowship should be fostered by respect and generosity among neighbors and visitors, not destroyed by disrespectful, even if constitutionally protected, conduct having little or no social value. Perhaps the resolution of this controversy will permit both parties to enable the show to go on in a way that reunites, and does not further divide, this community.

RECOMMENDATION

For the foregoing reasons, the undersigned respectfully **RECOMMENDS** that Defendant's Motion to Dismiss be **DENIED**, except as to Plaintiff's claim that her right to free association under the First and Fourteenth Amendments was violated by The Town. **IT IS FURTHER RECOMMENDED** that Plaintiff's Motion for Preliminary Injunction be **GRANTED** and that Defendant be preliminarily enjoined from prohibiting Plaintiff from attending or participating in all events at the Depot open to the general public.

The parties are hereby advised that, pursuant to 28, United States Code, Section 636(b)(1)(C), written objections to the findings of fact, conclusions of law, and recommendation contained herein must be filed within ten (10) days of service of same. Failure to file objections to

this Memorandum and Recommendation with the district court will preclude the parties from raising such objections on appeal. *Thomas v. Arn*, 474 U.S. 140, 152, 106 S. Ct. 466, 473 (1985); *United States v. Schronce*, 727 F.2d 91, 93-94 (4th Cir. 1984).

This 20th day of June 2003.

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MAX O. COGBURN, JR.
UNITED STATES MAGISTRATE JUDGE